

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.54 OF 2003

Union of India represented through
the Commissioner of Customs (General). ... Petitioner.

vs.

M/s.Lloyds Realty Limited. ... Respondents.

Mr.M.I.Sethna, Sr.Counsel with M.S.Brenda D'Souza on behalf of
Mr.Suresh Kumar i/b. T.C.Kaushaik, for Petitioners.

Mr.Janak Dwarkadas with Zal Andhyarunjinha with Ms.M.Meherji i/b.
M/s.Gagrat & Co., for Respondents.

CORAM: D.K.DESHMUKH, J.

DATED: 9th August, 2005

P.C.:-

1. By this petition, the petitioner challenges the Award made by the sole Arbitrator dated 13.8.2002. Before me the only part of the Award which is challenged is the part by which the amount of Rs.1.95 crores has been ordered to be paid as damages to the petitioners by the respondents. The case of the petitioners is that the Arbitral Tribunal

has committed error in computing the damages only for the period from 1.9.1999 till 4.11.1999. According to the petitioners, the damages should have been held to be payable till 20.7.2000. Perusal of the Award shows that the Arbitral Tribunal has held that the buildings were completed by the builder and the builder was in a position to give possession of those buildings and gets occupation certificate also. But because as per the terms of the Contract and also as per the communication from the petitioners the petitioners were to get the buildings inspected either by C.P.W.D or by I.I.T and that inspection was to be done before moving in for occupation certificate, the builder cannot be held responsible for delay after 4.11.1999, though the occupation certificate was actually secured on 20.7.2000.

2. According to the petitioners, the interpretation put on the terms of contracts and the communication between the parties by the learned Arbitrator is erroneous. According to the petitioners, getting building inspected by C.P.W.D or some other agency was the responsibility of the petitioners and the builder had nothing to do with that. The inspection could have been got done by the petitioners even after the occupation certificate is secured by the builder. It is submitted that the reliance placed by the learned Arbitrator on the letter dated 17.2.2000, as also on the Note dated 14.2.2001 is erroneous. It is also submitted on behalf of the petitioners that the learned

Arbitrator has not properly appreciated the terms of the contract. It is submitted that there is an obligation cast by the terms of contract on the builder to hand over the possession free of encumbrances but the builder was not in a position in the year 1999, to hand over the possession of the buildings free of encumbrances because the Bank had not given no objection till the year 2002. It is also submitted that the construction placed by the sole Arbitrator on the terms of contract is totally erroneous.

3. I have gone through the record and I have heard the learned Counsel for the parties. This is a petition filed under Section 34 of the Arbitration and Conciliation Act, 1996. The settled law as to the Jurisdiction of the Court under section 34 of the Act is that in case the Court finds that the findings recorded by the Arbitrator are the findings which are possible to be recorded on the basis of material available on record, then the Court does not have jurisdiction to disturb the Award. Perusal of the Award shows that the learned Arbitrator has considered the terms of contract in detail and has also referred to the correspondence between the parties. The learned Arbitrator in the Award has observed thus:-

“The materials available on record is replete with repeated requests and urgings from the Builder to the Purchaser that CPWD has to be

involved straightway so that the inspection work and certification process can be completed early, clearing the deck for occupation. The letters dated 22/07/1998, 20/09/1998, 07/10/1998, 28/12/1998, 26/10/1999, 17/02/2000 etc. are demonstrative of the keenness of the Builder in expediting the process of inspection by CPWD or any other appropriate agency. In the letter dated 26.10.1999, the Builder has emphasized that any delay in getting the flats and premises inspected by the authority will be on account of Purchaser and Builder will not take responsibility of any kind for such delay. Similarly, in the communication dated 17.2.2000, the view has been expressed that occupation certificate should be obtained only after inspection of the property is done by the designated inspection agency so that any changes, if any, suggested by inspection agency may be carried out prior to obtaining such occupation certificate. Annexure 'M' to the note [letter from Commissioner of

Customs (G) dated 14.2.2001] also serves to highlight that the occupation certificate was delayed because the Purchaser engaged IIT as inspection agency after 7-8 months. Thus, to all intents and purposes, the delay in engaging IIT for inspection was solely attributable to the purchaser and the said delay has not been explained inspite of the fact that the Purchaser was flooded with a spate of communications from the Builder urging them to get the inspection expedited and also that the Purchaser was keenly alive to the fact that they have to enlist the services of some other agency for inspection and not CPWD.”

It is clear from the observations quoted above that the learned Arbitrator has recorded a clear finding that as per the terms of contract the inspection of the building was to take place before the occupation certificate is secured. It appears from the correspondence between the parties which is referred to by the arbitrator that the respondents were asking the petitioner to get the inspection done so that the respondents can get occupation certificate, but the petitioner did not tell the respondents that the respondents need not wait for inspection and should get the occupation certificate. In my opinion, Clause 19 of

the Contract is relevant, which reads as under:-

“19. In case any defect in the construction or the quality of materials used is notified by the C.P.W.D., the rectification shall be carried out by M/s.Lloyds Realty Limited at the time of handing over of the flats. The Purchaser will occupy the buildings only after certification by the C.P.W.D. Of the defects having rectified by the Builder.”

Perusal of the above above clause shows that during the inspection the C.P.W.D was to find out whether there are any defects in the construction or in the quality of materials used and if the C.P.W.D finds any defect in the construction then the defects were to be rectified by the builder. Perusal of this clause therefore, shows that it would be a reasonable construction to be put on this clause that the inspection was to precede any move for occupation certificate. The learned Arbitrator in the Award in relation to Clause 19 of the Agreement, has observed that:-

“Clause 19 of the Agreement says “in case any defect in the construction or the quality of materials used is noticed by CPWD, the rectification shall be carried out by M/s.LRL at

the time of handing over of the flats. The Purchaser will occupy the building only after certification by CPWD of the defects having rectified by the Builder”. From this clause, it follows that certification by CPWD should precede any move for occupation certificate since as per BMC norms, if any structural change is to be carried out, the occupation certificate cannot be obtained or amended. The occupation certificate is final and that finality can be reached only after ensuring that all the specifications are in order and defects have been rectified as per certification by IIT Powai in the instant case.”

The above construction put on clause 19 by the learned Arbitrator in my opinion, is not only a possible construction but also a reasonable construction, and therefore, in my opinion, no fault can be found regarding construction put on clause 19 of the Agreement by the learned Arbitrator.

4. So far as the aspect of unencumbered possession is concerned, perusal of the Award shows that that aspect of the matter

has also been dealt with by the learned Arbitrator and further considering that the possession of the buildings has already been handed over and for several years the petitioners are in possession without there being any claim made on behalf of the Bank, in my opinion, this aspect of the matter has been dealt with properly by the learned Arbitrator. The learned Arbitrator has held that it is clear from the agreement that the Vyasa Bank Ltd. to whom the property was mortgaged had permitted the builder to enter into an agreement with the petitioner. The Arbitrator has also considered that there was indemnity clause contained in the agreement which indemnifies the petitioner against any claim made by the Vyasa Bank Ltd. In my opinion, the view that has been taken by the learned Arbitrator is reasonable and possible view and also considering, as observed above, the fact that the Vyasa Bank Ltd. in fact has not made any claim against the petitioner, it will not be appropriate to disturb the Award for that reason. It is further to be seen here that the learned Arbitrator was appointed in terms of the provisions of clause 12 of the Agreement between the parties. The dispute was between the Customs Department of the Union of India and the builder. The learned Arbitrator who has made the Award was the Chief Commissioner of Income Tax, Bombay. It is apparent from the Award that the learned Arbitrator has given detail reasons for the findings that he has recorded. It is not the case of the petitioner that the learned Arbitrator

has excluded from his consideration any relevant material. The findings that have been recorded by the learned Arbitrator after taking into consideration the material available on record are essentially the findings of the facts and therefore, it will not be possible for this Court to disturb those findings considering the limited jurisdiction conferred on this Court by Section 34 of the Arbitration and Conciliation Act,1996.

5. Thus, taking overall view of the matter therefore, in my opinion, as I find that the finding recorded by the learned Arbitrator are possible findings, it will not be appropriate for this Court to disturb the Award in its limited jurisdiction under Section 34 of the Arbitration & Conciliation Act,1996. The petition therefore fails and is dismissed. Petitioners are directed to pay costs of this petition to the Respondents as incurred by the Respondents.
